

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHAUN HARNER	:	CIVIL ACTION
	:	
v.	:	
	:	
GREYHOUND LINES, INC.	:	NO. 02-0088

MEMORANDUM AND ORDER

HUTTON, J.

February 13, 2003

Currently before the Court are Defendant's Motion to Strike Plaintiff's Claims (Docket No. 16), and Plaintiff's Opposition to Defendant Greyhound Lines, Inc.'s Motion to Strike Plaintiff's Claim (Docket No. 19).

I. BACKGROUND

Plaintiff, Shaun Harner, is a wheelchair-bound paraplegic who is visually impaired. Plaintiff initiated this action as a result of Greyhound's alleged mistreatment of Mr. Harner during a trip from Pine Grove, Pennsylvania to Hammond, Louisiana and back. Specifically, Plaintiff asserts that Greyhound failed to provide him with lift equipment, resulting in the need for Plaintiff to be hand-carried onto the bus. Plaintiff complains that he suffered a laceration while being manually lifted from his wheelchair. Moreover, Plaintiff alleges that the various bus drivers refused to purchase food and beverages for him. One particular bus driver called Plaintiff names such as "honkey" and "cracker." Plaintiff comes before the court seeking redress for alleged violations of

Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12184.

While being deposed by counsel for Greyhound on November 15, 2002, Plaintiff claimed that he made two suicide attempts as a result of the humiliation he suffered during his trip to Louisiana. When questioned about how he attempted suicide, Plaintiff explained that he attempted suicide the first time by smoking marijuana. Thereafter, Plaintiff's counsel instructed his client to assert his Fifth Amendment Privilege against self-incrimination. Plaintiff refused to answer any follow up questions concerning his drug use, including an identification of the supplier of marijuana. Plaintiff did, however, identify another person who supplied Plaintiff with illegal drugs.

Defendant seeks to have this Court strike Plaintiff's claim because it is allegedly disadvantaged by Plaintiff's invocation of his Fifth Amendment rights. For the reasons set forth below, Defendant's Motion is denied.

II. LEGAL STANDARD

The privilege against self-incrimination may be raised in civil as well as criminal cases. Securities and Exchange Commission v. Graystone Nash, Inc., 25 F.3d 187 (3d Cir. 1994). Contrary to the rule in criminal cases, however, invoking the Fifth Amendment in civil cases may open the door for adverse inferences to be drawn therefrom. Baxter v. Palmigiano, 425 U.S. 308, 318, 96

S. Ct. 1551, 1558, 47 L. Ed. 2d 810, 821 (1976). Before invoking the privilege, therefore, a party must consider its disadvantages. Graystone Nash, Inc., 25 F.3d at 190.

On the other hand, a party's assertion of its Fifth Amendment privilege may pose serious problems for an adverse party, which is thereby denied a source of what could conceivably be invaluable information. Graystone Nash, Inc., 25 F.3d at 190. There is also a concern about the exploitation of the privilege, whereby a party invokes the Fifth Amendment, creating an impenetrable shield during discovery, and later waives the privilege when the adverse party can no longer reap the benefits of discovery. Id. A court must, therefore, consider the ramifications on both sides of a Fifth Amendment assertion in civil cases. As the Third Circuit has held, "[a] trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment." Graystone Nash, Inc., 25 F.3d at 192.

The Supreme Court held that the Constitution limits "the imposition of any sanction which makes assertion of the Fifth amendment privilege 'costly.'" See Spevack v. Klein, 385 U.S. 511, 515, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574, 577 (1967) (quoting Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 1232-33, 14 L. Ed. 2d 106, 110 (1965)). For example, a person cannot be forced to incriminate himself because of a governmental need. See

Lefkowitz v. Cunningham, 431 U.S. 801, 808, 97 S. Ct. 2132, 2137, 53 L. Ed. 2d 1, 8-9 (1977).

Federal Rule of Civil Procedure 26(b)(5) permits the withholding of material otherwise subject to discovery. See Graystone Nash, Inc., 25 F.3d at 190. Rule 26(b)(5) does not, however, insulate a party any time the Fifth Amendment is invoked. See Id. (holding that the "principle that the invocation of the privilege may not be too 'costly' does not mean that it must be 'costless'"). Rather, it is only when a party properly invokes its Fifth Amendment privilege that it is not subject to sanctions. Id.

III. DISCUSSION

Because the assertion of privilege does not occur in a vacuum, a court must consider the rights of all litigants. Id. Where a party invokes its Fifth Amendment privilege until it waives that privilege on the eve of trial, a court may refuse to allow such a belated waiver. Id. The assertion of Fifth Amendment privilege forces an adverse party to conduct discovery with one hand tied behind its back, as it is not privy to the content of the privileged matter. To later require that party to defend against such new information at trial, without the benefit of discovery, would tie its other hand, placing it at an unfair disadvantage. See id. at 191; see also Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989).

When determining whether to dismiss the claims raised by the

party invoking its Fifth Amendment privilege, a court must balance: 1) whether the alleged illegal conduct is central to defendant's case, 2) whether there was no effective substitute for Plaintiff's answers, and 3) whether there was no adequate alternative remedy. See Serafino v. Hasbro, Inc., 82 F. 3d 515, 518 (1st Cir. 1996). Moreover, a court should consider that "[a]n adverse party in a civil case is not prevented from presenting evidence to the factfinder to support his own position even in the absence of testimony from the party invoking the privilege." See Graystone Nash, Inc., 25 F.3d at 191.

Defendant asserts that it has been placed at a severe disadvantage because Plaintiff invoked his Fifth Amendment privilege. Defendant argues that Plaintiff's invocation impedes Greyhound's ability to investigate: the degree of Plaintiff's drug use, the extent to which drug use may have contributed to Plaintiff's alleged harm, whether such drug use impaired Plaintiff's perception of how Defendant treated him, and whether drug use affects Plaintiff's ability to recall events. Defendant asserts that its greatest disadvantage stems from the fact that it cannot defend itself against Plaintiff's claim of attempted "suicide by marijuana."

Plaintiff's Motion must be denied for several reasons. First, Plaintiff's attempted suicide is not "central" to the case. See Serafino, 82 F. 3d at 518. The primary issue in the instant

case concerns purported violations of the ADA during Plaintiff's bus trip. Whether Plaintiff attempted suicide two weeks after that trip does not prevent Defendant from gathering information about the actual handling of Plaintiff during his trip. See Serafino, 82 F.3d at 518. Second, Defendant is not prevented from presenting evidence concerning Plaintiff's drug use, even if Plaintiff continues to invoke the privilege. See Graystone Nash, Inc., 25 F.3d at 191. Third, the Court recognizes that Plaintiff's attempted suicide claim is relevant to damages. The Court also recognizes that the Defendant wants to be prepared on this issue. In the event that this case goes to trial, however, and Plaintiff seeks to waive his privilege before trial, the Court may, in its discretion, disallow Plaintiff from testifying about this issue if the Defendant is placed at a disadvantage. Graystone Nash, Inc., 25 F.3d at 191; see also Gutierrez-Rodriguez, 882 F.2d 553. Consequently, Defendant's Motion to Strike is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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O R D E R

AND NOW, this 13TH day of February, 2003, upon consideration of Defendant's Motion to Strike Plaintiff's Claims (Docket No. 16), and Plaintiff's Opposition to Defendant Greyhound Lines, Inc.'s Motion to Strike Plaintiff's Claims (Docket No. 19), IT IS HEREBY ORDERED that Defendant's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.